Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1146

CHARLES DAVID CARVER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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The State of Florida, respondent, files this response as directed by this Court and moves that the writ of certiorari be denied.

STATEMENT

On May 6, 1976, an amended criminal information was filed, charging petitioner with custody

with intent to show an obscene film entitled "Virgin Rape."

On February 12, 1976, officers of the Sheriff's Office of Pinellas County served the petitioner with a search warrant and seized a copy of the subject film herein, "Virgin Rape." The search warrant was issued both on the basis of an affidavit signed by Investigator John Lohde, who had viewed the film in a theater, and the issuing judge's determination that the film, which he had also viewed, was obscene. Thereafter, on March 30, 1976, the petitioner through his retained attorney, filed a Motion for Copy of Seized Film, requesting that he be furnished a copy of the

film at the state's expense. On May 14, 1976, the petitioner filed two motions to dismiss, the second motion to dismiss directed to his assertion of non-compliance by the state with petitioner's motion for a copy of the seized film. Petitioner also asserted that the Circuit Court of the Second Judicial Circuit of the State of Florida lacked jurisdiction to try him on a felony charge. No hearings were ever set or requested by the petitioner on those motions, nor did the petitioner present any evidence to the trial court establishing no other copy of the film to be available.

The court denied the above enumerated motions. The petitioner changed his plea from not guilty

to nolo contendere, reserving the right to appeal the denial of the pre-trial motions. A direct appeal of the petitioner's judgment and sentence was taken to the District Court of Appeal, Second District and on February 16, 1977, petitioner's judgment and sentence were affirmed without opinion. Petition for rehearing was filed and denied. Petitioner then timely filed a petition for writ of certiorari to the District Court of Appeal, Second District, in the Supreme Court of the State of Florida. On November 14, 1977, the Supreme Court determined that it lacked jurisdiction, and ordered the petition denied. Petitioner then filed the petition for writ of certiorari

initiating this cause.

QUESTIONS PRESENTED

I.

IS PETITIONER'S CONVICTION VIOLATIVE OF THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS SINCE IT WAS PREDICATED UPON THE SOLE COPY OF A SEIZED FILM FOR WHICH RETURN AND/OR COPYING WAS DENIED CONTRARY TO *HELLER v. NEW YORK*, 413 U.S. 483 (1973)?

II.

HAS PETITIONER BEEN ADJUDICATED GUILTY OF A FELONY BY A COURT LACKING IN JURISDICTION CONTRARY TO THE DUE PROCESS GUARANTEES OF THE FIFTH AND FOURTEENTH AMENDMENTS?

(As Stated by Petitioner)

ARGUMENT

I.

IS PETITIONER'S CONVICTION VIOLATIVE OF THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS SINCE IT WAS PREDICATED UPON THE SOLE COPY OF A SEIZED FILM FOR WHICH RETURN AND/OR COPYING WAS DENIED CONTRARY TO *HELLER v. NEW YORK*, 413 U.S. 483 (1973)?

Petitioner's obscenity conviction rests upon his decision to enter a plea of nolo contendere to the charge of custody with intent to exhibit an obscene motion picture. The validity of the seizure of that motion picture is not challenged by the petitioner on any First or Fourth Amendment basis. Rather, he urges this Court

to exercise its discretionary certiorari jurisdiction solely upon his assertion that the courts of the State of Florida have violated the dictates of *Heller v. New York*, 413 U.S. 493 (1973) in refusing to furnish him a copy of the film seized, and that that refusal mandates a reversal of his criminal conviction.

Petitioner did, indeed, file motions requesting a copy of the film seized to be furnished to him "at state expense". No hearings were ever requested by petitioner in pursuit of such motions, nor was any showing made by him to the court that the copy of the film seized was the sole copy available. None of the State procedural rules governing discovery, by means of which a copy

of the film might have been secured, were employed by the petitioner. The ruling of the trial judge denying the return of the film was predicated upon petitioner's failure to properly pursue the State procedures for the return of the film, and not on a refusal to recognize the dictates of *Heller v. New York*, 413 U.S. 493 (1973).

This Court in *Heller v. New York*, 413 U.S. 483 (1973), required only that copying of a seized film be permitted if necessary for continued exhibition of the film pending judicial determination of the obscenity issue. Neither *Heller* nor any other authority exists in support of petitioner's conclusion that the State is required to furnish a copy of a seized film at State expense to a non-indigent

defendant. More importantly, no showing that the seizure of the copy precluded its continued exhibition was ever made by the petitioner.

The State court record presents no substantial federal question raised by the petitioner. His motions were denied in the trial court due to his failure to pursue State procedural rules, unchallenged on any constitutional basis. Petitioner argues that it is the responsibility of the State to "tender" a copy of the seized film in a cause such as petitioner's.[1] However, the *Heller* opinion

1 This language is garnered from an unfortunately constructed sentence in *State v. U&L Theatres, Inc.*, 307 So.2d 879 (Fla. 2d DCA 1975). The question in that cause was the validity of the seizure of the only copy of allegedly obscene materials prior to a

itself recognizes that it is incumbent upon the accused to demonstrate the non-availablity of additional copies and to seek copying, if available.

Additionally, petitioner seeks to have this Court mandate an extreme sanction for the alleged failure to furnish a copy of a seized film. This sanction is totally inappropriate. Essentially, petitioner argues a First and Fourteenth Amendment violation as a result of the failure to return the film. Petitioner asserts that the failure to permit copying must result in the reversal of a criminal conviction unchallenged on any other basis. The protective mantle of the

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judicial determination of probable cause by a neutral, detached magistrate.

First and Fourth Amendment does not extent this far. This Court in *Heller* enunciated the appropriate sanction: The failure to permit copying should result in the return of the seized materials.

ARGUMENT

II.

HAS PETITIONER BEEN ADJUDICATED GUILTY OF A FELONY BY A COURT LACKING IN JURISDICTION CONTRARY TO THE DUE PROCESS GUARANTEES OF THE FIFTH AND FOURTEENTH AMENDMENTS?

Petitioner did not challenge the jurisdiction of the court before which he entered his plea in the District Court of Appeal, Second District of the State of Florida, although he did so in the trial court. He did attempt to revive the issue in his petition for writ of certiorari in the District Court of Appeal, Second District filed in the Supreme Court of the State of Florida. However, his failure to argue the point before

the District Court necessarily precluded that court's having ruled on this basis, and rendered it impossible for their decision in this cause to have generated conflict with any other decisions relating to the jurisdictional question raised by petitioner. *Lake v. State*, 103 So. 2d 639 (Fla. 1958). Hence, any Federal question petitioner seeks to pursue in this petition on this point has not been properly raised before the courts of the State of Florida, since petitioner abandoned it in his direct appeal. Fla. R. App. P. 3.7(j); See also, *Evans v. Maggio*, 559 F.2d 430 (5th Cir. 1977); *Beck v. Washington*, 369 U.S. 541 (1962); *Parker v. Illinois*, 333 U.S. 571 (1948). Respondent would further note that petitioner's

prior misdemeanor convictions were affirmed by the Circuit Court of the Sixth Judicial Circuit on June 7, 1977.

CONCLUSION

WHEREFORE, based upon the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL

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Tampa, Florida 33602

Counsel for Respondent

CERTIFICATE OF SERVICE

I, MARY JO M. GALLAY, Counsel for Respondent, and a member of the Bar of the United States, hereby certify that on the _____ day of May, 1978, I served three copies of the Response to the Petition for Writ of Certiorari on Robert Eugene Smith, Esquire, 1409 Peachtree Street, N.E., Atlanta, Georgia 30309, by a duly addressed envelope with postage prepaid.

MARY JO M. GALLAY
Assistant Attorney General